U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0652 BLA

CHRISTOPHER GONZALES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CHEVRON MINING, INCORPORATED	)	DATE ISSUED: 09/27/2018
	)	
and	)	
	)	
BROADSPIRE SERVICES, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Bradley Austin (Wolfe, Williams & Reynolds), Norton, Virginia, for claimant.

Timothy Hale (Hale & Dixon), Albuquerque, New Mexico, for employer/carrier.

BEFORE: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-05626) of Administrative Law Judge John P. Sellers, III, rendered on a subsequent claim filed on February 11, 2013,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge accepted the parties' stipulation that claimant has twenty-four years of coal mine employment, and found that all of claimant's work was performed on the surface of an underground mine site. Because the evidence established that claimant is totally disabled by a respiratory or pulmonary impairment, he found that claimant demonstrated a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(c), and invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4).[2] The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

Employer appeals, arguing that the administrative law judge erred in finding that claimant is totally disabled. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a brief. Employer filed a reply brief, reiterating its contentions.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

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[1] Claimant filed his first claim for benefits on November 7, 2003, which was denied by the district director for failure to establish any element of entitlement. Director's Exhibit 1. No action was taken by claimant with regard to the denial until he filed the current subsequent claim. Director's Exhibit 3.

[2] Under Section 411(c)(4) of the Act, claimant is entitled to a presumption of total disability due to pneumoconiosis if the evidence establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b). A miner who worked aboveground at an underground mine need not prove substantially similar working conditions. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011).

and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Invocation of the Section 411(c)(4) presumption - Total Disability

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function or arterial blood gas studies,[4] evidence of cor pulmonale with right-sided congestive heart failure, or medical opinion evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge found that all of the pulmonary function studies and blood gas studies are qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii),[5] and that claimant established total disability based on the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv).[6] Decision and Order at 13-14; *see* Director's

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[3] The record reflects that claimant's coal mine employment was in New Mexico. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] The administrative law judge found that there was no evidence that claimant has cor pulmonale with right-sided congestive heart failure or complicated pneumoconiosis. 20 C.F.R. §§718.204(b)(2)(iii); 718.304; Decision and Order at 12.

[6] Dr. Klepper diagnosed a severe respiratory impairment. Director's Exhibit 10. Dr. Sood opined that claimant is totally disabled from his last coal mine employment. Claimant's Exhibit 1. Dr. Tuteur also opined that claimant is "totally and permanently

Exhibit 10; Claimant's Exhibit 1; Employer's Exhibit 1. Employer generally asserts that "the evidence considered as a whole compels a conclusion that [c]laimant has failed to prove total disability." Employer's Brief in Support of Petition for Review at 8. However, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 446 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Because employer does not identify specific error with regard to the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), and (iv), they are affirmed. We further affirm the administrative law judge's overall finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b), and his determination that claimant invoked the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(b).

II. Rebuttal of the Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that he has neither legal nor clinical pneumoconiosis,[7] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1336-1337 (10th Cir. 2014); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to establish rebuttal under either method.[8]

A. Legal Pneumoconiosis

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disabled from returning to work as a coal miner or work requiring similar effort." Employer's Exhibit 1.

[7] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[8] The administrative law judge found that employer disproved that claimant has clinical pneumoconiosis. Decision and Order at 17.

In order to disprove that claimant has legal pneumoconiosis, employer is required to establish that he does not suffer from a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). Employer asserts that the administrative law judge erred in discrediting Dr. Tuteur's opinion that claimant does not have legal pneumoconiosis.[9] We disagree.

The administrative law judge correctly noted that Dr. Tuteur opined that claimant's chronic obstructive pulmonary disease (COPD) is due entirely to smoking, based on a "relative risk" theory.[10] Employer's Exhibit 1. The administrative law judge rationally concluded that this theory "relegates to insignificance any secondary causes" for claimant's respiratory condition "and undermines the additive effects" that coal dust exposure may have had on claimant's COPD. Decision and Order at 19; *see* 65 Fed. Reg. 79,920, 79,940-43 (Dec. 20, 2000); *Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 828-29 (10th Cir. 2017); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007). The administrative law judge also permissibly rejected Dr. Tuteur's opinion to the extent it was based on statistical generalities, rather than the specific facts of this case. *See Goodin*, 743 F.3d at 1345-46; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 18.

The administrative law judge has discretion to determine the credibility of the medical evidence. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). Employer's arguments regarding Dr. Tuteur's opinion amount to little more than a

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[9] Dr. Tuteur is the only physician of record to opine that claimant does not have legal pneumoconiosis. Employer's Exhibit 1.

[10] Dr. Tuteur diagnosed that claimant has chronic obstructive pulmonary disease (COPD), and identified three potential causes for this condition, which included cigarette smoking, coal dust exposure, or fossil fuel exposure from a stove that claimant's mother used when he was growing up. Employer's Exhibit 1. He noted that "the clinical picture of COPD caused by each of these three risk factors is no different," and therefore relied on the relative likelihood of each factor causing claimant's COPD. *Id.* He explained that fossil fuel exposure was the most common worldwide cause of COPD, while twenty percent of smokers who were not coal miners develop COPD, but coal miners who never smoked develop COPD at the rate of one percent or less. *Id.* Dr. Tuteur concluded that even if it was "statistically possible for an individual miner to develop COPD as a result of inhaling coal mine dust, it occurs relatively infrequently and therefore attributing COPD to coal mine dust was not valid for an individual cigarette smoking miner such as [claimant]." *Id.*

request that the Board reweigh the evidence, which we are not empowered to do.[11] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the administrative law judge's findings that employer failed to disprove the existence of legal pneumoconiosis and therefore failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[12]

B. Disability Causation

The administrative law judge discredited Dr. Tuteur's opinion regarding the cause of claimant's disabling COPD because he did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the disease. Decision and Order at 20*; see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-505 (4th Cir. 2015), *quoting Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (where physician failed to properly diagnose pneumoconiosis, administrative law judge "may not credit" that physician's opinion on causation absent "specific and persuasive reasons"); *Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994) (a medical opinion premised on an erroneous finding that a miner did not have pneumoconiosis is "not worthy of much, if any, weight" on the issue of disability causation); *see also Scott v. Mason Coal Co.,* 289 F.3d 263 (4th Cir. 2002). Employer does not specifically challenge the administrative law judge's finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Thus, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption under the second rebuttal method by establishing that no part of claimant's respiratory disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii).

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[11] Because we affirm the administrative law judge's rejection of Dr. Tuteur's opinion, and there is no other evidence to support employer's burden of proof on rebuttal, it is not necessary that we address employer's assertion that Dr. Sood's opinion is biased and not credible to establish legal pneumoconiosis. Employer's Reply Brief at 2.

[12] Because employer must disprove both legal and clinical pneumoconiosis, rebuttal under 20 C.F.R. §718.305(d)(1)(i) is precluded, based on our affirmance of the administrative law judge's findings on legal pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge